United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

[CORRECTED COPY]

77-1060

To be argued by
PETER NOEL DUHAMEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1060

UNITED STATES OF AMERICA,

Appellee,

—v.—

ORLANDO DIAZ,

Appellant-Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

PETER NOEL DUHAMEL,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

PAGE

STATUTES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1060

UNITED STATES OF AMERICA,

Appellee,

—v.—

ORLANDO DIAZ,

Appellant-Defendant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Orlando Diaz appeals from a judgment of conviction entered on January 21, 1977, in the United States District Court for the Southern District of New York, after a trial before the Honorable Charles L. Brieant, United States District Judge, and a jury.

Indictment 76 Cr. 599 was filed in two counts, on June 25, 1976. Count One charged Diaz and three other defendants* with conspiracy to distribute, and to possess with the intent to distribute, cocaine in violation of Title 21, United States Code, Section 846. Count Two charged Diaz and the other defendants with the actual possession

* Those defendants were Luis Valerio, John Doe, a/k/a "Felix", and John Doe, a/k/a "Felix' Brother". They have at all times been fugitives.

and distribution of cocaine in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).

On October 20, 1976, a first trial commenced before the Honorable Charles H. Tenney. On October 22, 1976, when the jurors announced they were unable to reach a verdict, a mistrial was declared. The case was thereafter reassigned to Judge Brieant. The second trial commenced on December 7, 1976, and continued until December 10, 1976, when the jury returned verdicts of guilty on each count.

On January 21, 1977, Diaz was sentenced to concurrent terms of imprisonment of four years on Counts One and Two, to be followed by a special parole term of three years. Diaz is presently serving his sentence.

Statement of Facts

A. The Purchase of Narcotics

On the evening of June 27, 1974, Frank Marrero, a New York City Police officer assigned as an undercover investigator with the New York Drug Enforcement Task Force, met with a suspected cocaine trafficker named Luis Valerio at the Mona Lisa Social Club in upper Manhattan.* (Tr. 16-18).** At that time Marrero purchased approximately one ounce of cocaine from Valerio for $750 and they arranged for the sale of one-eighth of a kilogram of cocaine for the next evening at the Mona Lisa Club. (Tr. 21-22).

---

* A confidential informant, who was not called to testify at trial, was also present (Tr. 39).

** Citations to "Tr." refer to pages of the official trial transcript.

Early in the evening of June 28, 1974, after receiving a message when he arrived at the Mona Lisa Club, Marrero proceeded to 42 Sickle Street in Manhattan. (Tr. 23). Marrero was met there by Valerio and a man identified to him only as "Felix." Valerio explained that he was going to acquire the cocaine and that they would meet later at the Mona Lisa Club. (Tr. 24).

Officer Marrero later returned to the Mona Lisa where he was subsequently joined by Valerio and then Felix. Felix showed Officer Marrero a quantity of cocaine and stated that the sale would have to take place back at 42 Sickle Street. The parties left the scene by automobile, Felix driving a car bearing New York license plate number "699XIC." (Tr. 25-26).

Upon arriving at the Sickle Street address, Valerio left Marrero's car and had a short conversation on the sidewalk with a man subsequently identified as the defendant Orlando Diaz. Diaz then entered the automobile with license number 699XIC and drove away. (Tr. 27-29).

Valerio and Marrero then entered Apartment 2-E at 42 Sickle Street where a man identified as "Felix' brother" and Felix were waiting. Felix and his brother apologized for the delay in the transaction and said they would be available for future deals. Felix left briefly to see if "his man" (Diaz) had returned; he had not. (Tr. 29-A).

After more conversation concerning possible future cocaine transactions, Marrero accompanied Valerio, who had to make a telephone call, around the corner to a bar, since there was no telephone in Apartment 2-E. (Tr. 30). While returning to 42 Sickle Street, Valerio identified the man he talked to when they first arrived at

that location (that is, Diaz) as the person who was getting the cocaine that Marrero was buying. Diaz, who arrived just before them, signalled to Valerio and then proceeded inside to Apartment 2-E; Valerio then told Marrero that the cocaine was there and they followed Diaz into the apartment. (Tr. 32).

Once inside, Diaz handed the cocaine to Felix who inspected it with Valerio. Felix then handed the narcotics to Marrero in exchange for $4,000 that Marrero gave to him, and he counted the money into several separate bundles. At that time Diaz shook hands with Marrero, apologizing for delaying the delivery of the four ounces of cocaine. (Tr. 33-34). Marrero then left the apartment in possession of the cocaine, which was subsequently turned over to a Drug Enforcement Administration chemist for analysis.*

B. Observations of Diaz

Diaz was observed on the night in question by several officers of the New York Police Department who were then assigned to the Drug Enforcement Task Force.

Officer Frank Marrero, of course, described in detail his direct undercover transactions with Diaz. He first observed Diaz talking with Valerio in front of 42 Sickle Street. (Tr. 27-28, 70-71). Marrero later saw Diaz enter 42 Sickle Street, just after Diaz was identified by Valerio as the person who was getting the drugs. (Tr. 32, 71-72). Immediately thereafter Marrero again observed Diaz in Apartment 2-E in possession of the four ounces of cocaine, where they spoke and shook hands. (Tr. 33-34, 72, 75). Marrero identified Diaz during the trial. (Tr. 29-29-A).

---

* The parties stipulated that the material sold to Marrero was in fact analyzed and found to be cocaine. (Tr. 143).

Detective Gerald Kieran, who was a member of the back-up surveillance team at the time of the June 28th incident, described in detail his observations of Officer Marrero and the individuals with whom he met on June 28, 1974. (Tr. 94-100). In particular, he twice observed Diaz on the sidewalk in front of 42 Sickle Street. (Tr. 100-01). Detective Kieran identified Diaz during the trial. (Tr. 101-02).

Officer Robert Bisbee, who conducted surveillance on foot during the narcotics transaction on June 28, 1974, also identified Diaz during the trial as a man he had seen on the evening of June 28 with Officer Marrero. (Tr. 215).

In addition, the parties stipulated that the car registration for license plate 699 XIC—the plate on the car used during the narcotics transaction—was assigned to Orlando Diaz. (Tr. 90-91).

ARGUMENT

POINT I

This Court Should Not Require a Hearing on Pre-trial Identification Procedures Under the Circumstances Of This Case.

Diaz's principal contention on appeal is that he was not informed of pre-trial identification procedures used by the witnesses who testified against him at trial, and that thus a hearing is now necessary. In particular, he claims that an affidavit filed by an Assistant United States Attorney in response to a pre-trial request for discovery of "procedures used to identify Orlando Diaz" was inaccurate, and that, thus misled, he was unable to

determine or explore the true facts at trial. While the representation made by the Assistant was not entirely accurate, the true facts were sufficiently developed at Diaz's trials and Diaz was sufficiently forewarned of those facts by other discovery material made available to him that this present claim of ignorance is unfounded. For this reason, and because of the legal insufficiency of any claim he might make on the basis of the facts, his request for a hearing should be rejected.

A. Facts

As indicated in the Statement of Facts, three police officers each saw Diaz on the evening of June 28, 1974, and identified him at trial. Officer Marrero, of course, was in Diaz's direct presence on three separate occasions during the course of his undercover narcotics activities. (Tr. 27-29, 32, 33-34). On the last of these occasions, he engaged in conversation with Diaz over the course of several minutes, and indeed shook hands with him. (Tr. 33-34). Officer Kieran saw Diaz twice during his surveillance activities. (Tr. 100-01). On one of those occasions, while he was pretending to double-park his car directly next to Diaz in an intentional effort to gain the best perspective of him, he was 15 feet away from Diaz under good lighting conditions, and did not have "any difficulty" seeing him. (Tr. 102). Officer Bisbee, who was called by Diaz to testify about other matters (Tr. 183-203), stated on cross-examination that on June 28, 1974, he observed Diaz with Officer Marrero during his surveillance, on foot, of the narcotics transaction. (Tr. 225).

At the time of these observations, of course, Diaz was not identified by name. He was, however, seen by Marrero (Tr. 26-27) leaving to find the narcotics in a Ford with license plate number 699 XIC, and Kieran (Tr. 98)

and Bisbee (Tr. 213) also identified the plate number of the car. On the very evening of June 28, 1974, the officers determined through a computer file that vehicle 699 XIC was registered to Orlando Diaz, and a copy of that registration was admitted into evidence at trial. (Tr. 90).

On the morning following the transaction, and among other leads followed by the officers, Marrero, Kieran and Bisbee checked the "BCI" police file under the name Orlando Diaz and in that file found a photograph of Diaz. This photograph was several months * later shown to the informant who had initially introduced the officers to the defendants in this case.**

B. Diaz failed to make any motion for a hearing in the District Court

Prior to the first trial of Diaz, in which a mistrial was eventully granted, he moved for discovery of the

---

* At the time of sentence, the District Court inquired why there had been such delay in apprehending Diaz. The prosecutor explained that shortly after the narcotics transactions, and before Diaz, who was a fugitive, could be arrested, all of the officers on the case were reassigned to a massive investigation of other narcotics dealers. This investigation involved their time for several months before they could return to locating and apprehending Diaz. (Tr. 348-50).

** The informant, of course, did not testify for either party. The details of the discovery of the photograph described in this paragraph were not fully described at trial. Officer Marrero, on cross-examination, did note that he saw a photograph of Diaz "the following day" after the transaction on June 28, 1974; the Court, without objection having been made by Diaz, ordered that statement stricken from the record. (Tr. 76). The prosecutor subsequently explained during a side-bar discussion concerning a different issue that the officers had, in confirming the identity of Diaz, gone through the "BCI" file. (Tr. 210). In addition, of course, and as will be described in more detail *infra*, pp. 9-10, Diaz was on notice from at least the time of the first trial that the officers had a photograph of him.

"procedures used to identify Orlando Diaz." The Assistant United States Attorney then in charge of the case responded by affidavit noting that "no line-up was conducted during the investigation of this case. Nor was a photograph spread used."

Diaz now claims that throughout the trial "defense counsel was left with the erroneous impression that the Government's prior representation remained valid." Brief at 12. Whatever reliance might properly have been placed on the affidavit,* the record of the two trials makes it clear that Diaz's feigned ignorance of the existence of some photographic identification is absurd. It follows that his failure to request a hearing, or even an informal elucidation of the facts, bars his present claim for relief.

It is axiomatic that claims of error cannot be raised for the first time in an appellate court, and must be raised and, if necessary, explored in the trial court. *United States* v. *Braunig*, Dkt. No. 76-1448, slip op. 2773, 2779 (2d Cir. April 11, 1977); *United States* v. *Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907

---

* The representation made by the first Assistant that there had been "no line-up" and "no photographic spread" was, of course, technically accurate. We do not intend to rely, however, on the semantic accuracy of the phrasing in the affidavit; the impression that the response reasonably gave was unfortunate, and it would have been far the better course to have made all the facts explicit. The omission was, of course, based upon ignorance of the true facts. While this does not excuse it, it does underscore the obvious fact that *no one*—including, as we will show, Diaz, who was certainly on notice that *some* photograph of him had been available to the officers—considered the existence of the photograph to have been of any importance in making the in-court identification.

(1966). Any other rule would necessarily result in "piecemeal" litigation and delay that is particularly detrimental to the criminal process. *United States* v. *Alessi*, 544 F.2d 1139, 1143 (2d Cir.), *cert. denied*, 97 S.Ct. 384 (1976). Furthermore, the defendant clearly bears a burden of insuring that the trial court is aware of his position and of making, if necessary, proper and timely requests for information or relief. For example, in *United States* v. *Nathan*, 536 F.2d 988 (2d Cir.), *cert. denied*, — U.S. —, 45 U.S.L.W. 3331 (Nov. 1, 1976), the defendant offered a certain tape recording into evidence. The trial court "temporarily excluded" the tape "pending proper identification of the scope and contents of the tape." *Id.* at 991. This Court noted that while the tape had clearly been offered into evidence, the defendant could not rely on this to preserve the issue; rather the defense's failure subsequently to *re*-offer it into evidence "deprives it of grounds for attacking the trial court ruling on this appeal." *Id.* at 992.

Despite any reasonable inference that might have been made from the prosecutor's response to his discovery requests, Diaz was clearly on notice that a photograph had been used in making or confirming his identification, and his failure to request *any* further relief at any time during or between his two trials precludes his claim on appeal. For example, during trial Officer Marrero explicitly stated that he saw a photograph of Diaz "the following day" after his arrest. (Tr. 76). In addition, as noted, the prosecutor informed the Court and counsel that the agents had identified Diaz by reference to his "BCI" file. (Tr. 210). Finally, and conclusively, the agents' written reports explicitly mention in no fewer than four separate places their possession of the "BCI" photo of Diaz and the details of their showing it to the informant and others who did not testify. Since these reports were turned over to Diaz in their entirety before

his *first* trial in October 1976 pursuant to 18 U.S.C. § 3500, they were thus available to him for six weeks *before* the trial in which he was convicted. While his lawyer made explicit reference to the existence of the reports and the manner in which they were made during his cross-examination of the witnesses (Tr. 54, 132-37, 188, 192-93, 198-203), he never once asked the witnesses about the photograph, made a motion for a hearing, or even informally requested further details on the matter.* It follows that the potential issue of photographic identification was "available but not pressed below," *United States* v. *Braunig*, *supra*, slip op. at 2779; *United States* v. *Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976), and Diaz is precluded from raising it on appeal.

The recent decision of the United States Court of Appeals for the Third Circuit in *United States* v *Mitchell*, 540 F.2d 1163 (3d Cir. 1976), is instructive in this regard. Indeed, the facts are virtually identical to those of this case. There, the defendant "attempted to ascertain [prior to trial] whether any identification procedures had been employed by the Government in the course of its investigation . . . . " 540 F.2d at 1165. The Government responded merely that "no line-up identification procedure was effected." *Id.* In fact, as subse-

---

* At the time of sentence, the prosecutor made it even more explicit that "there was an identification made immediately, in fact a day or two days after the incident, as a result of a mug shot." (Tr. 350). Similarly, during discussions of the Court's instructions to the jury, the prosecutor explicitly stated that the officer-witness had seen a "mug shot" of Diaz. (Tr. 313). Diaz nonetheless made no request for elucidation or a post-trial motion to the District Court. While post-trial motions are not jurisdictionally necessary in cases where the issue had been properly preserved, his failure to make one (or an informal equivalent) does serve to illustrate that the question of a possible taint of the in-court identification was not of great moment to him, but rather is an appellate afterthought.

quently appeared at trial, the witnesses in question had been shown a formal photographic spread. The Court rejected the defendant's claim of reversible error, noting "Although the answer . . . was not complete, the defense attorney should have realized that such answer was equivocal as soon as he received it. He was free to press for a more complete answer, but did not do so." *Id.* at 1166. This case follows *a fortiori* from *Mitchell* since the witnesses here were never shown a formal photographic spread and, more particularly, Diaz was demonstrably aware of the "equivocal" nature of the Government's response at least since the time of the first trial six weeks before the trial in which he was convicted. See also *United States* v. *Bennett*, 409 F.2d 888, 898-99 (2d Cir.), *cert. denied, sub nom. Haywood* v. *United States*, 396 U.S. 852 (1969), where this Court specifically noted that it would not rule on a claim of impermissible suggestiveness in a pre-trial photographic identification since defense counsel did not sufficiently develop the relevant facts, although "there was nothing to prevent making an adequate record. . . ."

C. The record discloses that the witnesses had an independent basis for their in-court identification

Even if this Court were to excuse Diaz's failure to press this issue in the District Court, it should nonetheless decline his request that the case be remanded for a hearing. The sole possible purpose of such a hearing would be to determine whether the photograph seen by the officers created "a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*,

390 U.S. 377, 384 (1968).* Since the record conclusively shows that the officers making the observation had a sufficient basis for making the in-court identification wholly independent of the photograph, it follows that a hearing is not necessary.**

---

* Diaz claims that the purpose of holding a hearing would be simply to determine if any pre-trial photographic identification took place. Brief at 14. He asserts that if it develops that one did take place, it follows that "a new trial must be granted, since the Government's non-disclosure, even after specific request . . . precluded appellant's preparation of an adequate defense, and was so unfair as to deny him due process." *Id.* (footnote and citation omitted). This is silly. First, the fact of a pre-trial identification of a photograph was made explicit during trial (Tr. 76, 313, 350) and, as indicated, must have been expressly known by Diaz weeks before trial from the 3500 material. Thus, the issue he seeks to resolve is already clear. Second, while we represent that any possible misunderstanding flowing from the prosecutor's response to discovery was inadvertent, this is at any rate abundantly clear from the clarity with which the fact of a pre-trial identification was made through the 3500 material, the statement of officer Marrero at trial (Tr. 76), and the statement of the prosecutor at side-bar (Tr. 210). Finally, *United States* v. *Agurs*, 427 U.S. 97 (1976), upon which Diaz relies, Brief at 14, expressly notes that the fact that suppression of material favorable to the defendant by the Government is intentional rather than inadvertent does not itself entitle him to greater relief. *Id* at 110 and n.17.

It follows that the sole possible purpose of the hearing Diaz seeks would be to determine whether the photograph "irreparably" precluded a fair in-court identification.

** While Diaz claims that the Government's failure to apprise him of the prior photographic examination deprived him of his ability to cross-examine the witnesses and test their credibility, Brief at 13-14, this assertion ignores the obvious fact that a prior identification of Diaz by the witnesses was obvious from the 3500 material and the testimony at trial, and Diaz nonetheless never even attempted to cross-examine the witnesses about it. See p. 15, *infra*, at note.* Indeed, Diaz's extensive use of the 3500 material without touching the issue of a pre-trial identification demonstrates that this was a deliberate trial tactic.

It is clear from numerous decisions of this Court that pre-trial identification involving a single photograph is by its very nature impermissibly suggestive. *Brathwaite* v. *Manson*, 527 F.2d 363, 366 (2d Cir. 1975), *cert. granted*, 425 U.S. 957 (1976); *United States* v. *Reid*, 517 F.2d 953, 966 (2d Cir. 1975); *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 801 (2d Cir.), *cert. denied, sub nom. Gonzalez* v. *Vincent*, 414 U.S. 924 (1973). In cases where only the in-court, and not the out-of-court, identification is offered,* however, the mere fact of an impermissible prior identification does not itself entitle the defendant to relief. Rather, the issue becomes whether the initial observation provided a sufficient independent basis for assurance that the in-court identification was based on it rather than the photograph. *United States* v. *Wade*, 388 U.S. 218, 239-40 (1967); *Neil* v. *Biggers*, 409 U.S. 188, 200 (1972); *United States ex rel. Rutherford* v. *Deegan*, 406 F.2d 217 (2d Cir.), *cert. denied*, 395 U.S. 983 (1969); *United States ex rel. Frasier* v. *Henderson*, 464 F.2d 260 (2d Cir. 1972). In making this assessment, the reviewing court should look at, among other things, the closeness and duration of the observation, the conditions under which it was made, the length of time between the initial observation and the trial, and the motives of the witness to remember the person whom he saw. *United States* v. *Reid*, *supra*, 517 F.2d at 966; *Neil* v. *Biggers*, *supra*, 409 U.S. at 200. Of these factors, only the length of time between the initial observation of Diaz and the

---

* *Brathwaite* v. *Manson*, upon which Diaz rlies in part, concerned the admissibility of an *out-of-court* identification. That decision held that where an impermissible identification occurs (in that case, as in this, a single photograph was shown to a witness), use of that *prior* identification is barred, irrespective of the witness' independent basis for making a subsequent identification. That holding, of course, is of no relevance here, since no pre-trial identification of Diaz was offered into evidence.

trial casts even the slightest doubt upon the observation of him by Marrero and the other officers.*

As against this, Marrero in particular had the best possible opportunity to observe and remember Diaz. Indeed, on the final occasion he spoke directly with Diaz for several minutes and actually shook hands with him indoors under good lighting conditions. While Kieran's opportunity to see Diaz was not so intimate, he testified that he spent several moments pretending to park his car right next to Diaz near a street light with the express intention of seeing and remembering him. (Tr. 102). As this Court has noted, agents who are "trained observers" may be counted upon to observe and remember a suspect under conditions where another might not. *United States* v. *Reid, supra*, 517 F.2d at 966. Finally, of course, the fact that all three agents recognized Diaz as the man whom Marrero engaged in a narcotics operation on June 28, 1974, confirms that there was no misidentification, as did the indisputable fact that the license plate number on the car in which the narcotics were carried to the transaction was registered to Diaz.** It

---

* The delay between the initial observation and first seeing the photo, however, was minimal, since Officer Marrero testified that he saw the photo "the following day." Cf. *Neil* v. *Biggers, supra*, 409 U.S. at 201 (delay of seven months held insufficient to preclude identification).

** In denying Diaz's motion for an acquittal at the close of the Government's case, Judge Brieant noted that the car registration evidence provided corroboration for the in-court identifications. (Tr. 151). This Court has held on numerous occasions that "other evidence connecting a defendant with the crime may be considered on the issue of whether there was a substantial likelihood of misidentification." *United States* v. *Reid, supra*, 517 F.2d at 967 n. 17; *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 803-04 (2d Cir.), *cert. denied, sub nom Gonzalez* v. *Vincent*, 414 U.S. 924 (1973).

follows that there was no possibility of misidentification based upon seeing a photograph, and Diaz's claim is without merit.* As in *United States* v. *Magnano*, 543 F.2d 431, 438 (2d Cir. 1976), *cert. denied*, — U.S. —, 45 U.S.L.W. 3570 (Feb. 22, 1977),** even though there has been no identification hearing prior to trial, the facts at the trial itself demonstrate that the identification of Diaz was based upon an independent observation, and thus no hearing is required.***

---

* While Diaz on appeal claims that the issue of identification was crucial at trial and now attacks the nature of the officers' testimony, Brief at 12-13, a review of the record at trial reveals that there Diaz did precious little to demonstrate this. For example, while Marrero described in detail on direct examination the nature of his observation of Diaz, on cross-examination—which consumed twice as many transcript pages as the direct—only the barest attempts were attempted to elicit the conditions under which the observations were made. While Diaz did establish the distance between Marrero and Diaz at the time of their first encounter (Tr. 71), the crucial confrontation in the apartment was barely explored (Tr. 71-73), and certainly no attack was made on Marrero's opportunity to see Diaz at that time. Similarly, while Officer Kieran on direct examination described the lighting conditions under which he observed Diaz and stated that he did not have "any difficulty" in doing so (Tr. 102), no attempt was made on cross-examination (other than an elicitation of the time of day, Tr. 125) to explore or in any way cast doubt on this observation. Officer Bisbee was not even examined by Diaz about the circumstances of his observation. (Tr. 216). While the defendant was clearly not under any burden to adduce such proof, his apparent lack of interest belies his present assertion that the identifications were suspect.

** This Court noted that the defendant in *Magnano* "had full *opportunity* to explore the circumstances of the pre-trial identification. . . ." *Id.* at 437-38 (emphasis added).

*** The manner in which the pre-trial identification by the officers occurred offers a further basis for distinguishing the cases upon which Diaz relies. In all of the cases in which a pre-trial photographic identification was found "suggestive," another person selected a photograph as a likely suspect and then showed the photograph to the witness to determine if the selection was correct. Typically, for example, police officers take a photograph

[Footnote continued on following page]

---

of a person they determine may have committed a crime and show it to a witness. *United States* v. *Ash*, 413 U.S. 300, 317-21 (1973); *Simmons* v. *United States, supra*, 390 U.S. at 384. In that situation, a single photograph shown to the witness will be "suggestive" precisely because implicit in the selection of the photograph by the person conducting the test is the assertion that the photograph is of the perpetrator of the crime. This was perhaps most clear in *Brathwaite* v. *Manson, supra*, where a police officer selected the defendant's photograph on the basis of the witness' description and his *own* knowledge that the defendant frequented the area of the crime. 427 F.2d at 367 n.5, 371-72.

In this case, the officers came upon the photographs in the normal course of pursuing the principal lead available to them, that is, the name Orlando Diaz on the registration of the car used in the narcotics transaction, which led to the BCI file. Since that photograph was not selected on the basis of another person's conclusion that Diaz had committed the crime, it follows that the "impermissibly suggestive" cases are inapplicable.

While no decision appears to have been directed to this precise situation, the reasoning underlying the identification cases compels this concluson. Beginning with *Stovall* v. *Denno*, 388 U.S. 293 (1967), the Supreme Court and this Court have condemned techniques that are "unnecessarily" suggestive. In *Stovall*, for example, an otherwise impermissible "show-up" was found justifiable because the witness was in the hospital and near death. *Id.* at 301-02. By contrast, the photograph shown to the witness in *Brathwaite* v. *Manson, supra*, was explicitly found to be "unnecessarily" suggestive, since there "was no emergency that prevented D'Onofrio [who showed the photograph to the witness] from assembling a suitable array of photographs," 527 F.2d at 367; see also *United States* v. *Reid, supra*, 517 F.2d at 966. Indeed, the Supreme Court has noted that "The purpose of a strict rule barring evidence of *unnecessarily* suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available. . . ." *Neil* v. *Biggers, supra*, 409 U.S. at 199 (emphasis added). In this case, unlike situations where police select a photograph of a potential suspect and then show it to a witness, the agents themselves were merely following one lead among others, and inevitably came upon the photograph in a situation where "assembling a suitable array of photographs," *Brathwaite* v. *Manson, supra*, 527 F.2d at 367, is not practically possible. There is simply no "more reliable" method of investigation that is feasible, and

[Footnote continued on following page]

POINT II

The Modified "Allen" Charge Was Entirely Proper.

During its second day of deliberations, the jury sent a note to Judge Brieant stating that it was unable to reach a verdict. Without any objection having been made to the procedure, Judge Brieant then read to the jury a modified "Allen" charge. *Allen* v. *United States*, 164 U.S. 492 (1896). Diaz now claims that this charge was "coercive and unbalanced," Brief at 16, requiring a new trial. His argument is without merit.*

In the main, Diaz's argument proceeds by the simple expedient of lifting many of Judge Brieant's remarks out of context. For example, his initial claim is that the judge coerced the jury by noting that they had not heeded his prior instructions. Brief at 17. This remark, however, simply could not have had the effect of coercing or even leading the jury toward any verdict, since, as the charge itself makes exceedingly clear, the remark was solely directed toward the fact that the jurors had de-

---

the deterrent rationale underlying, in part, the proscription of impermissible photographic displays, see *United States* v. *Reid*, *supra*, 517 F.2d at 966; *Brathwaite* v. *Manson*, *supra*, 527 F.2d at 371, is inapplicable. Rather, this case is governed by this Court's observation in *United States* v. *Gentile*, 350 F.2d 461, 468 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976), that "there is no claim that the out-of-court confrontation was in any way anticipated or arranged by the government. Therefore the dangers of improper influence that prompted the requirement in *United States* v. *Wade* [citation omitted] that counsel be notified of an impending identification procedure were not present here."

* The statement, "well, it didn't work last time, did it?" (Tr. 328), in response to an offer by defendant's counsel to submit a version of the *Allen* charge used in Diaz's first trial, is merely another example of the dry sense of humor of the Honorable Charles L. Brieant.

liberated among themselves in raised voices.* An admonition to proceed in a reasonable manner surely cannot be considered coercive.

Diaz's next claim is that the jurors should not have been told that they should reach a verdict. As he correctly perceives, this issue is foreclosed by this Court's decision in *United States* v. *Bowles*, 428 F.2d 592, 596-97 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970). In that case, this Court noted that "The very purpose of a properly worded supplemental charge is to encourage jury agreement," citing *United States* v. *Rao*, 394 F.2d 354, 355 (2d Cir.), *cert. denied*, 393 U.S. 845 (1968); *United States* v. *Hynes*, 424 F.2d 754 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970). Indeed, the charge in that case was upheld in the absence of any counterbalancing language that each individual juror should, if still unconvinced, persist in his judgment; since Judge Brieant emphasized this principle on several occasions during the short supplemental charge (Tr. 330, 332-33), and indeed ended upon this note (Tr. 334), this case is governed *a fortiori* by

---

* Judge Brieant noted, in a portion of the charge not quoted by Diaz, "it's quite clear to me, because my office is right in here, that you have been shouting at each other and you have been raising your voices, and I must say that's inconsistent with reasonable, intelligent deliberation . . . ." (Tr. 329). Judge Brieant later noted to counsel that while he had heard loud voices, he had never been in a position to discern what was being said. (Tr. 335).

Bowles.* Furthermore, none of the decisions upon which Diaz relies holds to the contrary.**

Finally, Judge Brieant's supplemental charge, viewed as a whole, was well within the bounds set by this Court of "permissible encouragement of the jury to pursue their deliberations toward a verdict, if possible, in order to avoid the expense and delay of a new trial. The jury was neither coerced nor directed toward any verdict." *United States* v. *Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976); *United States* v. *Bermudez*, 526 F.2d 89, 99-100 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); see also *United States* v. *Tyers*, 487 F.2d 828, 832 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974). In particular, the charge reiterated that the burden of proof remained at all times on the Government to prove guilt beyond a reasonable doubt (Tr. 332), and noted that if the jurors had any reasonable doubt about the evidence, and in particular about Officer Marrero's testi-

---

* Diaz attempts to distinguish *Bowles* by noting that "there was no objection to the charge and, taken as a whole, the instructions were not coercive." Brief at 17. This attempted distinction is erroneous. First, the lack of objection was not cited by the Court in *Bowles* as a ground for not reaching the issue—indeed, Judge Weinfeld's opinion discussed the charge at length, and found it proper—but as additional demonstration that the charge was not coercive. Second, while Diaz made several specific objections to the supplemental charge, he never included this ground. Finally, the assertion that the charge approved in *Bowles* was less coercive than the charge in this case is fatuous, since the *Bowles* Court specifically noted that it would have been better to include language on the right of a juror to adhere to his own views—which was repeatedly done by Judge Brieant.

** In particular, *Powell* v. *United States*, 297 F.2d 318, 321 (5th Cir. 1961), upon which he relies heavily, is absolutely different. In that case, the trial judge characterized a juror who disagreed with his colleagues as acting out of "a pure spirit of stubbornness," *id.* at 319-20, nor did the charge include the balancing language given by Judge Brieant.

mony, they must acquit. (Tr. 332-33). Finally, he noted "I'm not going to coerce the jury, I'm not going to keep you for an unduly long time," (Tr. 334), and urged each of them "If after discussion you still don't agree, stick to your principles." (*Id.*). Under no common sense view could this charge be found coercive.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

PETER NOEL DUHAMEL,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1977— 714—017—591